1999

City of Salt Lake v. Keith Roberts : Brief of Appellant

Utah Court of Appeals

Salt Lake City Prosecutor; attorney for appellee.
W. Andrew McCullough; attorney for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

CITY OF SALT LAKE,	:	
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Case No. 990876-CA
	:	
KEITH ROBERTS,	:	Priority No. 2
	:	
Defendant/Appellant.	:	

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. WILLIAM W. BARRETT

BRIEF OF APPELLANT KEITH ROBERTS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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CITY OF SALT LAKE,	:	BRIEF OF APPELLANT
Plaintiff/Appellee,	:	
vs.	:	Case No. 9990876
KEITH ROBERTS,	:	
Defendant/Appellant.	:	

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to § 78-2a-3(2)(e) U.C.A.

ISSUES PRESENTED FOR REVIEW

1. When a person makes reasonable efforts to avoid being seen by others, and exposes his genitals in his automobile, has he willfully exposed himself in a place open to public view as defined by Salt Lake City ordinance? The issue was preserved for appeal by Defendant's trial Memorandum (R. 16-34) and at trial (Tr. 26-30). This is a question of statutory construction to be reviewed for correctness, giving no particular deference to the trial court's decision. See Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1038

(Utah 1989). Insofar as the issue depends on the sufficiency of the evidence to meet the requirements of the ordinance, Defendant must marshall the evidence in favor of Plaintiff and show that it is not sufficient. In re Beasley, 883 P.2d 1343 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

Revised Ordinances of Salt Lake City:

11.16.100. Urinating in Public and Other Disorderly Conduct.

It shall be unlawful for any person, while in a place open to public view, to willfully:

A. Urinate or stool;

B. Engage in sexual conduct, alone or with another person or an animal;

C. Make an intentional exposure of his or her genitals, pubic area, buttocks or any portion of the areola and/or nipple of the female breast;

D. Exhibit the private parts of any horse, bull, or other animal in a state of sexual stimulation, or to exhibit such animals in the act of sexual copulation. (Ord. 88-86 § 60 (part), 1986: prior code § 32-2-5)

§ 76-9-702. U.C.A. Lewdness -- Gross Lewdness.

(1) A person is guilty of lewdness if the person under circumstances not amounting to rape, object rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, or an attempt to commit any of these offenses, performs an act of sexual intercourse or sodomy, exposes his or her genitals or private parts, masturbates, engages in trespassory voyeurism, or performs any other act of lewdness in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another who is 14 years of age or older.

(2) Lewdness is a class B misdemeanor.

STATEMENT OF CASE

Nature of Case

This is an appeal from a judgment and order of conviction in which Defendant was convicted in the Third District Court for Salt Lake County of the crime of disorderly conduct pursuant to § 11.16.100 of the Salt Lake City code. The judgment of conviction was entered on August 30, 1999 and the notice of appeal was filed on September 1, 1999.

Defendant was tried before the court, moved to dismiss the charge against him, at the conclusion of Plaintiff's case. He did so on the grounds that the evidence introduced did not, as a matter of law, constitute a violation of the cited Section of the Salt Lake City Code. He had previously filed a trial brief in which Defendant claimed that his conduct did not fall under the terms of the ordinance in that he did not, as a matter of law, intentionally expose himself in a place open to public view.

Statement of Facts

On or about July 9, 1999, at about 8:45 PM, Salt Lake City vice officers observed a person they alleged was a "known prostitute" on State Street (Tr. 7). They observed Defendant stop his vehicle nearby; and the woman entered the vehicle (Tr. 8). First Defendant drove to another location under a viaduct, an area which the officer claimed was "one of our more popular places"

where people park in the hope of being unobserved (Tr. 9). On this occasion, however, there was a marked police car in the area, and "I think it spooked them" id. For whatever reason, Defendant drove to the location at 1860 South 900 West where he pulled into a back parking lot of a business (Tr. 11). Even though it was summer, it was certainly getting dark by this time. Defendant parked his car behind a couple of parked flat bed trucks in the very rear area of the lot id. The officers "parked in front of the bar so they couldn't see our car and we snuck around on foot and approached the car on foot." (Tr. 10). Officer Anthony Russell crawled underneath one of the flatbeds to get a look at what was going on (Tr. 12). He indicated he observed the woman expose her breast and Defendant "put his mouth to her breasts,. . .and that's when I approached the car from the back" (Tr. 15). He approached the car and "I went up to her window and knocked on her window, with my badge out and identified myself." (Tr. 16). He observed Defendant with his penis exposed, and in the process of "doing up his pants". id.

The second officer, Shawn Player, walked to the front of the trailer behind which Defendant had parked. From where he was, Officer Player saw: ". . . the top of the defendant's car and two heads." (Tr. 25). While he was not far from Defendant's vehicle, he saw nothing of the activity described by the other officer id.

The area in which Defendant parked his car was bordered on one side by a two-story cinder block wall (Tr. 20). On the second side was a chain link fence and another closed business, and on the third side were parked two flatbed trucks (Tr. 14, 20). On direct examination, Officer Russell described the accessibility of the area:

> I mean, they were-- they were somewhat hidden from this truck, I mean, they're not going to go park, you know, in someone's driveway; but while we were interviewing them after, right in here there was numerous people coming from the bar and getting into their trucks and leaving, so this gave them a little-- this flat bed gave them a little bit of hiding room, but yeah, you can walk back there, just like I did.

On cross-examination, officer Russell's testimony added the following:

> **Q.** Okay. So people were coming out of the bar?
>
> **A.** Yeah, in the parking lot.
>
> **Q.** All right. Any of them crawl under the truck to see what was going on?
>
> **A.** No.
>
> **Q.** And--and you give me a strange look. That, in fact, would be a fairly strange thing for people to do, wouldn't it? To crawl under a truck to see what's going on?
>
> **A.** If you're not a vice officer, maybe.
>
> Q: Officer, did you think in any manner that this defendant was attempting to show off his penis in public? Trying to show the -- the public what -- what a nice one he had?
>
> A: I think he was picking up a prostitute.
>
> **Q:** That's what you think, but you don't have any evidence of

that one, do you?

A: Actually, I have her--her--

Q: Yeah. But she's not here, is she?

A: No. But I have her interview with me (Tr. 21)

Defendant was arrested for violation of the Salt Lake City disorderly conduct ordinance, which roughly parallels the Utah statute on public lewdness. Defendant was convicted of willfully exposing his genitals "in a place open to public view". The prosecutor claimed that a sex act was also observed, though there was no evidence of such behavior.

SUMMARY OF ARGUMENTS

Appellant was convicted of a violation of a Salt Lake City ordinance, prohibiting a person from exposing his genitals "in a place open to public view". Appellant contends that he took reasonable efforts to avoid being seen when he allegedly exposed himself in his parked car. The ordinance requires the exposure to be done both "willfully" and "intentionally"; and Defendant's conduct does not meet the requirements of the statute or the Salt Lake City ordinance.

ARGUMENT

POINT I

DEFENDANT DID NOT INTENTIONALLY EXPOSE HIS GENITALS OR ENGAGE IN SEXUAL CONDUCT IN A PLACE OPEN TO PUBLIC VIEW.

Appellant stands convicted of disorderly conduct in violation of § 11.16.100 of the revised ordinances of Salt Lake City. This

is not a disorderly conduct case in the usual sense. Disorderly conduct is defined by the Utah State Legislature in § 76-9-102 U.C.A. The State crime by the same name involves activity which is "violent, tumultuous, or threatening". Disorderly conduct is generally an infraction, unless the person continues to engage in the disruptive behavior complained of after being asked to stop. The Information in this matter, charges an entirely different type of offense:

> Defendant, while in a place open to public view, willfully; engaged in sexual conduct, alone or with another person or an animal; or, made an intentional exposure of his or her genitals, pubic area, buttocks or any portion of the areola and/or nipple of the female breast (R. 7).

Although it is certainly not clear from the Information as to what conduct was charged, the City argued at trial that Defendant both engaged in sexual conduct and intentionally exposed his genitals "in a place open to public view." (Tr. 28). In effect, the City ordinance on disorderly conduct is similar to § 76-9-702 U.C.A. which defines public lewdness. Public lewdness under the state statute is also a class B misdemeanor; and it appears Salt Lake City has chosen to take a portion of that state statue and recodify it as disorderly conduct. The City, in recodifying, however, made a minor but perhaps important change in wording. Whereas the state statute requires the conduct to have occurred "in a public place," the City requires it to be "open to public view."

In finding Defendant Guilty, the Court did not differentiate between the "sexual conduct" and the exposure. It is clear,

however, that Defendant could not have been found guilty of public sexual activity under this ordinance. Apparently, the prosecutor was referring to the claim by the officer that he had seen Defendant put his mouth over the breast of the woman (Tr. 15). While the ordinance does not define "sexual conduct", the term is clearly the same as "sexual activity" as defined by State law:

> § 76-10-1301 (4) "Sexual activity" means acts of masturbation, sexual intercourse, or any sexual act involving the genitals of one person and the mouth of anus of another person, regardless of the sex of either participant.

The touching of the woman's breast by Defendant does not qualify as "sexual activity" under State law, nor can it be included as sexual conduct under the City Code. Thus, it is the exposure by Defendant of his genitals in his own automobile which constitutes the allegedly illegal act. Only one of the two officers observing the vehicle saw anything unusual. Obviously, he was determined to do so, to the degree that he crawled under a flatbed trailer and approached the car from the rear. He did not see the alleged exposure until he went up to the passenger window and looked in.

The Salt Lake ordinance requires "willful" conduct on the part of the Defendant. The Utah Code states the following in § 76-2-103:

> A person engages in conduct:
>
> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

The Utah Supreme Court, in State v. Larsen, 865 P.2d 1355 (Utah 1993) added the following:

> An individual must act willfully to be criminally liable under the statute. This means that the prosecution must prove beyond a reasonable doubt that the accused "desire[d] to engage in the conduct or cause the result." Utah Code Ann. § 76-2-103. This highly culpable mental state is not consistent with "strict liability," as that term is traditionally used. 865 P.2d at 1360.

It is perhaps unfortunate that this court will have to rely on "word pictures" presented by the prosecution witnesses, without the diagrams made at trial and shown to the trial court. Defense counsel expressed some concern about the fact that the diagrams were not being preserved (Tr.10). Nevertheless, they were not. The "word pictures", however, do preserve the general circumstances. Defendant parked in relatively remote place, deliberately behind other large vehicles, and against a blank concrete wall. The officers "snuck" to the general area before crawling under a truck. In his testimony, officer Russell stated "you can walk back there, just like I did." Obviously, the point is that a casual passerby could not walk back there in the manner that the officer did. First, he would not "sneak" up. Secondly, he would not crawl under a truck. When officer Russell went to the window of the car, he claims to have seen Defendant exposed, but "he was doing up his pants". It seems fairly obvious that Defendant was not "intentional" in the "exposure of his genitals";

nor did he act "willfully", "while in a place open to public view".

The instant case is very similar to that of State v. Broad, 600 P.2d 1379, 61 Haw. 187 (Haw. 1979):

> The only testimony at trial was that offered by the two arresting officers. The officers first observed appellant on Maunakea Street at about 3:00 a.m. on November 14, 1976, a Sunday morning. The two officers had been patrolling the downtown area when they saw appellant and a number of other individuals flagging vehicles to the side of the street. The officers watched appellant as he stopped an automobile and after a brief conversation with its driver entered the vehicle. The officers followed the car to Waikahalulu Lane where they found it parked on top of a hill, in a turnaround area opposite a residence at Waikahalulu Lane. It was then approximately 3:30 a.m. and the car was stationed between two street lights. There were no other lights from any of the nearby houses nor were any inhabitants awake at this time. The officers parked their cars behind appellant's car and got out. As they approached his car at a point about five to six feet away they saw appellant's head in the driver's lap moving up and down. Believing some form of sexual conduct was taking place, one of the officers turned on his flashlight, directed it into the car, and observed appellant and the driver engaged in the act of fellatio. At this point the officers arrested appellant, charging him with open lewdness in violation of HRS § 712-1217. 600 P.2d at 1380.

At the end of the case by the prosecution, Defendant moved for a judgment of acquittal:

> Appellant's motion for a judgment of acquittal was based on the prosecution's failure to produce sufficient evidence that appellant's act on Waikahalulu Lane occurred in a public place where he was likely to be seen by casual observers. This point constituted a crucial element of the prosecution's prima facie case and at this stage of the proceedings had not been established. 600 P.2d at 1380.

After reviewing the law on a public place in the State of Hawaii, the court held that the observed actions had not occurred

in a public place:

> The evidence presented by the officers at trial revealed that no persons other than the police officers saw appellant. And they themselves would not have seen him had they not followed him from Maunakea Street. In Rocker, appellants were seen by other citizens who then telephoned the police. Here on the other hand, appellant's car was found parked on top of a hill turnaround in a dead end. Although the road was in a residential area, the sole evidence offered as to the nature of the neighborhood was that there was one house across the street. The house was dark: no evidence of any inhabitants asleep or awake was introduced. No evidence of any pedestrian or vehicular traffic on the lane was offered. Nor were the lights of appellant's car on. Although the car was parked between two street lights, the officers themselves admitted they used flashlights to witness appellant's specific acts. It was 3:30 a.m. on a Sunday morning, hardly an hour when people would be traversing the street whether it be a busy thoroughfare or deserted land. Under these facts and circumstances it was improbable that appellant's acts would be observed by members of the public. Thus, the district court erred in denying appellant's motion for a judgment of acquittal. 600 P.2d at 1382.

Once again, Defendant here made no "willful" effort to be seen. In contrast, he made an effort not to be seen doing what the officers observed. Defendant was clearly looking for a place where he would not be readily observed. Officer Russell acknowledged this when he said Defendant first went to a place under a viaduct where he had seen others go to avoid being observed. When Defendant apparently perceived he might be observed there, he moved. And the place they parked was "somewhat hidden". The intent not to be observed was also obvious: "they're not going to go park, you know, in someone's driveway" (Tr. 17). It did not matter where he stopped on this occasion, because the officers were

determined to follow and observe him. There was literally no place where he could go which the officers would not claim was "open to public view". It was only because they followed him, crawled under a truck, and rushed at the car, that they were successful in seeing what they did. Just as in the Hawaii case, the actions of the Defendant were not likely to be seen "by casual observers". Because it was "improbable that appellant's acts would be observed by members of the public" the acts of Defendant fail to meet the ordinance under which Defendant is charged.

The view of the Court regarding the charge was straightforward:

> THE COURT: Well, see I would take the different view. If they were at Sugarhouse Park in a parking lot, doing it, that, in my mind, is a public place and they ought not to be doing it and they have no rights. That's my view.
>
> MR. DAYNES: Where they're in any public parking lot--
>
> THE COURT: Well, that's the point.
>
> MR. DAYNES: --committed that crime. It's open to public view.
>
> THE COURT: I think--I think the problem is that the language is tough to deal with, but I'm not going to struggle with it too much. It was a public parking lot, in my view, it was open to public view (Tr. 29-30).

The analogy of the court that it would be the same as "if they were at Sugarhouse Park in a parking lot" is false. Even in Sugarhouse Park, the circumstances must be reviewed. It would have to be determined what time of day it was, how many people were

around, how remote the parking lot was from other people, and other factors which might affect the likelihood of being seen by a casual passerby. The statement that this area was "a public parking lot" is not an adequate assessment of the circumstances. The area opened to parking for the bar was on the other side of the trucks. The parking area in which this Defendant was located was in an area in which bar customers would not park. It is likely that the area was used by employees or customers of the building behind (the one with the two story high concrete wall). In fact, there was no evidence that this was a "public parking lot". It is just as likely that the business owner would have made a trespassing complaint against this Defendant, if he had seen him. Such a complaint was not made, of course, due to the fact that nobody was around to observe him. The incident occurred in the evening, and the business had long since closed. The trial court made no attempt to review the entire circumstances, simply because the trial court misconstrued the language of the ordinance.

This situation was also faced by the New York State Court of Appeals in the case of People v. McNamara, 585 N.E.2d 788, 78 N.Y.2d 626 (N.Y. 1991). That Court handled four consolidated appeals filed by the prosecutor for the City of Buffalo, who was attempting to reinstate four Informations which had been dismissed as facially insufficient in the Buffalo City Court. The dismissals

had been upheld once on appeal by, the Erie County Court. This final appeal, by permission, to the State's highest court followed. The two lower courts had found that the Informations charging public lewdness were facially insufficient. The statute at issue stated that a person:

> . . .is guilty of public lewdness when he intentionally exposes intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, ... 585 N.E.2d at 789.

The Informations charged that Cheryl McNamara, Rose Marie Terrell, Martyn Hill and Alma Harrison intentionally exposed themselves or engaged in sexual intercourse in vehicles parked in public places. Specifically, the Information against Ms. McNamara stated the "vehicle in which Defendant was seated, was parked in a well lit area, and its interior was readily visible to passerbyers [sic]." 585 N.E. 2d at 790.

The New York Court first observed that the term "public place" as used in the statute had not been defined by the legislature. Neither the term "public place" as used in the Utah statute or the term "open to public view" used in the city ordinance have been defined. The Court then rejected a definition proposed by the State:

> We likewise reject the People's argument that the definition of "public place" should be drawn from Fourth Amendment decisions holding that there is a diminished expectation of privacy in automobiles. Plainly, the existence of a diminished expectation of privacy does not transform the

interior of an automobile into a "public place." 585 N.E. 2d at 791.

The Court found that the statute was aimed at protecting "unsuspecting, unwilling, nonconsenting, innocent, surprised, or likely-to-be offended or corrupted types of viewers" id. The State of New York argued that conduct which occurred on a public street was, by definition, a public place. The Court observed:

> Obviously, places that are public in a property sense may be very private in terms of the likelihood of casual observation. Though both may be "public," for example, the interior of a vehicle parked on the side of a desolate road is not a "public place" in the same sense that the interior of a car parked at a busy downtown shopping area might be. And between these two examples exist a wide variety of locales that may be classified as more or less "public."
>
> Because the term "public place" has no cut-and-dried meaning, it is necessary to interpret and apply the statute here in a manner that comports with its purpose. As been observed in the analogous context, since "the rationale of this provision is to prevent the open flouting of societal conventions, it should not condemn as debouchers of public morality persons who desire privacy and who take reasonable measures to secure it." (Model Penal Code and Commentaries, part II, § 251.1, comment 2, at 452 [ALI 1980].)
>
> That a member of the public may pass by is certainly part of the essence of a public place, and the harm to such a person's sensibilities is precisely that aimed at by the statute. Conversely, where no such harm is likely, the statute is not violated. We therefore conclude that the interior of a parked vehicle is a "public place" for purposes of this subdivision where the objective circumstances establish that lewd acts committed there can, and likely would, be seen by the casual passerby, whose sensibility the statute seeks to protect.
>
> Thus, the interior of a vehicle parked at a stated address is not itself a "public place," but it may become one under circumstances indicating that the car's interior is visible to a member of the passing public, and that the vehicle is

> situated in a place where it likely would be observed by such a person.
>
> Applying this definition to the facts at hand, it is clear that none of the informations before us describes a "public place" under the statute. Emphasis added. 585 N.E.2d at 792-3.

The New York Court observed that the attempt of the Buffalo police to use this ordinance against the various Defendants was apparently an attempt to criminalize consensual sodomy. The Utah police officer admitted in court that he did not believe there was intent on the part of the Defendant to be seen. It seems fairly clear from the circumstances that reasonable efforts were made by Defendant to avoid just such an observation. The officer, however, believed that he had caught the Defendant soliciting sexual conduct in violation of State and City prostitution laws. The problem, of course, is that the officer was unprepared to prove those allegations. He thus, in exasperation, did exactly what the Buffalo City Prosecutor did. He stretched, and found an ordinance that <u>almost</u> worked. This is simply misuse of the ordinance. It cannot be stretched to include the behavior at issue here. This is not what the statute was designed to prohibit. A policeman acting as a "peeping Tom" might observe any number of things if he sneaks up and looks through windows. Neither the State of Utah nor the City of Salt Lake has authorized him to do so.

POINT II

THIS COURT MAY NOT EXPAND THE DEFINITION OF "PLACE OPEN TO PUBLIC VIEW" OR "SEXUAL CONDUCT" IN ORDER TO CONVICT DEFENDANT.

There is, of course, some difference in wording between terms in the State statute and the City ordinance. The most significant difference is in the terms "sexual conduct" as opposed to "sexual activity" and the terms "open to public view" as opposed to "public place". The Courts of this State have ruled that areas of law that are regulated by the State may not be regulated by the City in an inconsistent manner. See Salt Lake City v. Allred, 20 Utah 2d 298, 437 P.2d 434 (Utah 1968); Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138 (Utah 1981); Richfield City v. Walker, 790 P.2d 87 (Utah App. 1990); and Walker v. Union Pacific R. Co., 844 P.2d 335 (Utah App. 1992). Therefore, the City cannot adopt a broader definition than has the State of Utah for either "public place" or "sexual conduct". Appellant contends, as he did at trial (R. 17) that the term "open to public view" is more restricted than the term "public place". Whereas a car might be parked in a public place, conduct within it might not be open to public view. The alleged exposure of Defendant's genitalia occurred in such a way that Officer Player could not see it, though he did try. It was only seen by Officer Russell by going up to the window and looking in. The term requires more for conviction than the one in McNamara. It is sufficient under the New York statute

(and under Utah law, which is virtually identical), that a person take reasonable measures to avoid being seen. It is clearly sufficient under this ordinance as well.

The term "sexual conduct" is likewise no broader than the similar term in State law. There was no sexual conduct, as there was no sexual activity. The city may suggest that the Salt Lake City ordinance really is more broad than State law; but cannot do so successfully.

It goes almost without saying that ordinances which are so vague that they cannot be easily understood by someone trying to comply with them are void for vagueness. Enforcement of ordinances which are unconstitutionally vague are in violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I Section 7 of the Constitution of Utah. See State v. Lindquist, 674 P.2d 1234 (Utah 1983) and In re: Boyer, 636 P.2d 1085 (Utah 1981). The law in Salt Lake City, as in everywhere else in the State of Utah on what is and is not sexual activity, is the same and is uniform. The Constitution says that. The State Legislature says that. Salt Lake City has no right to say anything else.

The California Supreme Court had an opportunity to construe the term "lewd or dissolute conduct" in the case of Pryor v. Municipal Court, 25 Cal. 3d.238, 599 P.2d 636, 158 Cal.Rptr. 330

(Cal. 1979). In that case, the Defendant claimed that this term was unconstitutionally vague. The court, in reply stated:

> We agree with defendant that the phrase "lewd or dissolute conduct" as construed by past decisions is unconstitutionally vague. If, however, we can reasonably construe the statute to conform with the mandate of specificity, we should not, and will not, declare the enactment unconstitutional. 25 Cal.3d at 244.

State Appellant Courts have inherent power to construe statutes and ordinances, and if necessary, narrow their interpretation to avoid unconstitutionality. It is likely that the city will ask this court for a broad interpretation of the terms which are undefined. If, however, that broad interpretation is given, the ordinance is in conflict with State Law and is void. A broad definition of the terms might also make the law unconstitutionally vague. A broad interpretation of the terms of the ordinance sufficient to find Defendant guilty would deny Defendant a fair warning of what conduct was proscribed by law. It goes almost without saying that ordinances which are so vague that they can not be easily understood by someone trying to comply with them are void for vagueness. See State v. Lindquist, 674 P.2d 1234 (Utah 1983) and In re Boyer, 636 P.2d 1085 (Utah 1981). The clear language of the ordinance in question parallels that of the State Statute, which only prohibits conduct in a place where casual passersby are likely to see. It only prohibits conduct specifically described as sexual activity and indecent exposure

within the terms of the statute. The city can only prevail by twisting the language to a degree where it makes no sense. This court should not extend the law as requested. The City drafted the ordinance; and it appears clear what the purpose was. If the City has additional concerns not addressed by the ordinance, it certainly can pass a new one. What it cannot do is re-interpret an existing ordinance to destroy its plain meaning, in an attempt to convict someone of a crime on inadequate evidence.

CONCLUSION

The ordinance under which Defendant was convicted in the lower court does not prohibit the conduct proved against Defendant. In the alternative, the ordinance is so vague in failing to define its terms, that it violates Defendant's rights to due process of Law, and cannot be so enforced against him. The District Court finding of Guilt must be reversed, and the case dismissed.

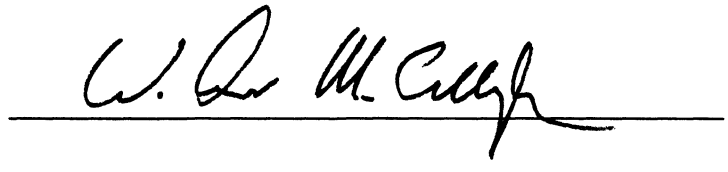
DATED this 8th day of December, 1999.

W. ANDREW MCCULLOUGH, L.L.C.

W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 1999, I hand delivered two true and correct copies of Appellant's Brief to Salt Lake City Prosecutor, attorney for Appellee, 349 South 200 East, Suite 500, Salt Lake City, Utah 84111.



APPENDIX

A. The Information filed in the District Court.

B. The Judgement of the District Court.

APPENDIX A

IN THE THIRD DISTRICT COURT
SALT LAKE DEPARTMENT

SALT LAKE CITY,
A Municipal Corporation

vs.

KEITH W ROBERTS

D.O.B. 08/29/42

DEFENDANT

99 JUL 13 P 4:37

INFORMATION

Court Case
Police Case 99136705
Citation
Judge 9919 14252 MC

STATE OF UTAH
City and County of Salt Lake ss.

THE UNDERSIGNED of Salt Lake City, in the County of Salt Lake, State of Utah on behalf of said City, on oath complains that the above name defendant whose other and true name is to complainant unknown, of Salt Lake City, in the County of Salt Lake and State of Utah on or abou 07/09/99 20:45, at Salt Lake City, in the County of Salt Lake and state aforesaid did commit the public offense of **VIOLATING THE SALT LAKE CITY CODE,** as follows, to-wit:

COUNT I: Disorderly Conduct
Defendant, while in a place open to public view, willfully; engaged in sexual conduct, alone or with another person or an animal; or, made an intentional exposure of his or her genitals, pubic area, buttocks or any portion of the areola and/or nipple of the female breast. A Class B misdemeanor.
IN VIOLATION OF SALT LAKE CITY CODE, SECTION 11.16.100

All counts located at approximately 900 W 1860 S

Will T. Abbott

JUL 13 1999
Complainant

Date

7.13.99.
Authorized by City Prosecutor

APPENDIX B

Third District Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT
450 South State Street, P.O. Box 1860, Salt Lake City, Utah 84111 - 1860

SENTENCE/JUDGMENT/ORDER
Criminal/Traffic

(CITY)/STATE Plaintiff

-VS-

ROBERTS, KEITH W.
Defendant

DOB: ___/___/___

Interpreter _____

CHARGES DISORDERLY CONDUCT

_____

Case Number 991914252

Tape number _____ C # _____

Date 8-30-99 Time _____

Judge/Comm WILLIAM W. BARRETT

Clerk MAURIE

Plaintiff Counsel _____

Defense Counsel _____

Amended _____

Amended _____

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

(1) Jail 60 DAYS Suspended 60 DAYS

Defendant to Commence Serving Jail Sentence _____

(2) Fine Amt. $_____ Susp. $_____ Fee $_____ Fine Bal $_____

_____ _____ _____ _____

TOTAL FINE(S) DUE $

Payment Schedule: Pay $_____ per month/1st Pmt. Due _____ Last Pmt. Due _____

(3) Court Costs $ _____

(4) Community Service/WP 30 Hours through Court 11-30-99

(5) Restitution $_____ Pay to: ☐ Court ☐ Victim ☐ Show Proof to Court

Attorney Fees $ _____

(6) Probation 12 MONTHS ☒ Good Behavior ☐ AP&P ☐ ACEC ☐ Other

(7) **Terms of probation:**

☒ No Further Violations

☐ AA Meetings _____ / wk _____ / month

☐ Follow Program

☐ No Alcohol

☐ Antibuse

☐ Employment _____

☐ Proof of _____

☐ Counseling thru _____

☐ Classes _____

☐ In/Out Treatment _____

☐ Health Testing _____

☐ Crime Lab Procedure

☐ _____

☐ _____

(8) Plea in Abeyance Diversion _____

(9) Review ___/___/___ at _____

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 238-7391, at least three working days prior to the proceeding.

William W. Barrett

District Court Judge

By _____

APPEAL MUST BE FILED WITHIN 30 DAYS OF JUDGEMENT

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